No. 04-6432

In the Supreme Court of the United States

AURELIO O. GONZALEZ,

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary for the Department of Correction,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that every Rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of *Amici Curiae* 1

Statement of the Case 1

Summary of the Argument 3

Argument 4

I. CAPITAL HABEAS PETITIONERS USE RULE 60(B) TO CIRCUMVENT THE RESTRICTIONS AGAINST SUCCESSIVE HABEAS LITIGATION IN 28 U.S.C. § 2244(b) 5

A. After the Conclusion of Habeas Proceedings, The Sole Interest of Capital Habeas Petitioners Is In Litigation for Litigation's Sake and the Delay That It Engenders 5

B. Recent Experience In Tennessee Shows How Capital Habeas Petitioners Can Use Rule 60(b) to Thwart AEDPA's Restrictions on Successive Habeas Litigation and Debase the State's Interest in Finality 9

II. MOTIONS FILED UNDER RULE 60(B) THAT SEEK TO REVISIT THE MERITS OF THE UNDERLYING FEDERAL HABEAS JUDGMENT SHOULD BE REGARDED AS SECOND OR SUCCESSIVE PETITIONS 19

A. This Court Endorsed the Proper Rule In *Calderon v. Thompson* 19

B. The "Functional Approach" Touted By Petitioner and His *Amici* Is Fundamentally Flawed 21

Conclusion 29

TABLE OF AUTHORITIES

Cases

Abdur'Rahman v. Bell, No. 96-cv-380 (M.D.Tenn.) . . . 11

Abdur'Rahman v. Bell, 534 U.S. 970 (2001) 11

Abdur'Rahman v. Bell, 535 U.S. 981 (2002) 11

Abdur'Rahman v. Bell, 535 U.S. 1016 (2002) 12

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) 12

Abdur'Rahman v. Bell, 332 F.3d 960 (6th Cir. 2003) . . 12

In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (Mar. 11, 2005) 8, 12, 21-24

Adams v. Holland, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 541 U.S. 956 (2004) 15

State v. Alley, No. M1991-00019-SC-DPE-DD (Tenn.) 17

Alley v. Bell, No. 97-3159 (W.D.Tenn.) 16, 17

Alley v. Bell, 540 U.S. 839 (2003) 16

Alley v. Bell, 392 F.3d 822 (6th Cir. 2004) 8, 16, 17, 21-22

Banks v. Dretke, 540 U.S. 668 (2004) 18

Baze v. Haeberlin, No. 01-cv-31 (E.D. Ky.) 8

Bell v. Thompson, *cert. granted* (No. 04-514) (Jan. 7, 2005) 9

Bowling v. Haeberlin, No. 99-cv-236 (E.D.Ky.) *8*

Brown v. Head, 349 F.3d 1291 (11th Cir. 2003) 8

Burris v. Parke, 130 F.3d 782 (7th Cir. 1997) 6, 20

Calderon v. Thompson, 523 U.S. 538 (1998) . . . . *passim*

Clayton v. Ward, No. 4:96-cv-173 (N.D.Okla.) 8

Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), *rev'd, Bell v. Cone*, 125 S.Ct. 847 (2005) . 14, 16, 18

Corey v. Bradshaw, No. 5:96-cv-797 (N.D.Ohio) 8

Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2902 (2004) 13, 15, 18

Dunlap v. Litscher, 301 F.3d 873 (7th Cir. 2002) 22

Evans v. Smith, 220 F.3d 306 (4th Cir. 2000) 8

Gonzalez v. Crosby, 125 S.Ct. 961 (2005) 3

Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004), *cert. denied*, __ S.Ct. __, 2005 WL 517049 (Mar. 7, 2005) 24

Hanover Ins. Co. v. United States, 880 F.2d 1503 (1st Cir. 1989) 10

Harper v. Vaughn,
272 F.Supp.2d 527 (E.D.Pa. 2003) 23

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238 (1944) 10, 19

Herrera v. Collins, 506 U.S. 390 (1993) 5

Hutchison v. Bell, No. 3:98-cv-664 (E.D.Tenn.) . . . 8, 15

Hutchison v. Bell, 539 U.S. 944 (2003) 14

Johnson v. Bell, No. 2:97-cv-3052 (W.D. Tenn.) . . 8, 18

Johnson v. Bell, No. 04-6361 (6th Cir.) 18

Johnson v. Bell, 541 U.S. 1010 (2004) 17

Jones v. Roper, 311 F.3d 923 (8th Cir. 2002) 8

Lambrix v. Singletary, 520 U.S. 518 (1997) 28

Mayle v. Felix, 125 S.Ct. 824 (2005) 27

In re Medina, 109 F.3d 1556 (11th Cir. 1997) 6, 8

McCleskey v. Zant, 499 U.S. 467 (1991) 5

Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002) 8

Murray v. Greiner, 394 F.3d 78 (2d Cir. 2005) 26

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) . . 26

Rodwell v. Pepe, 324 F.3d 66 (1st Cir.),
cert. denied, 540 U.S. 873 (2003) . . 6, 21, 22, 24, 28

Slack v. McDaniel, 529 U.S. 473 (2000) 26

Smith v. Anderson, __ F.3d __,
2005 WL 517525 (6th Cir. Mar. 6, 2005),
cert. denied, __ S.Ct. __, 2005 WL 520024
(Mar. 7, 2005) 8, 21

State v. Carter, 114 S.W.3d 895 (Tenn. 2003),
cert. denied, 540 U.S. 1221 (2004) 16

Smith v. Murray, 477 U.S. 527 (1986) 28

State v. Workman,
111 S.W.3d 10 (Tenn.Crim.App. 2002) 13

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 6, 26

Thompson v. Calderon,
151 F.3d 918 (9th Cir. 1998) 22

United States v. Beggerly, 524 U.S. 38 (1998) 10

United States v. Winestock, 340 F.3d 200 (4th Cir.),
cert. denied, 540 U.S. 995 (2003) 21, 22, 23

Wiggins v. Smith, 539 U.S. 510 (2003) 13

Workman v. Bell, No. 2:94-cv-2577 (W.D.Tenn.) 8

Workman v. Bell, 178 F.3d 759 (6th Cir. 1998) 12

Workman v. Bell, 209 F.3d 940 (6th Cir. 2000) 12

Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) 7

Workman v. Bell, 245 F.3d 849 (6th Cir. 2001) 10

Workman v. State, 41 S.W.3d 100 (Tenn. 2001) 13

Workman v. Bell, Nos. 04-6037/6038 (6th Cir.) 14

Zuern v. Tate, No. 1:92-cv-771 (S.D.Ohio) 8

Statutes and Rules

28 U.S.C. § 2244(b)(1996) 25
28 U.S.C. § 2244(b) . . . . . *passim*
28 U.S.C. § 2244(b)(1) 3, 7, 19, 24
28 U.S.C. § 2244(b)(2) 7, 19
28 U.S.C. § 2244(d) 1
28 U.S.C. § 2253 . . . . . 2, 26
Fed. R. App. P. 41(d)(2)(D) 10
Fed. R. Civ. P. 60(a) 19
Fed. R. Civ. P. 60(b) . . . . . *passim*
Tenn. Sup. Ct. R. 39 . . . . . 11, 15

Other Authorities

141 Cong. Rec. S7803-01, 7877
(daily ed. June 7, 1995) 4

Joint Explanatory Statement of the Committee of
Conference, H.Conf.Rep. No. 104-518,
reprinted in 1996 U.S.C.C.A.N. 944 4

Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*,
30 Am.J.Crim.L. 171 (2003) 7

Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Litigation*, 77 N.Y.U.L.Rev. 699 (2002) . . . 7

U.S. Dep't of Justice, Office of Justice Programs, *Federal Habeas Corpus Review, Challenging State Court Criminal Convictions* 17 (1995) 27

INTEREST OF *AMICI CURIAE*

In this case, the Court will address the question whether, or to what extent, a habeas petitioner may utilize Rule 60(b), Fed.R.Civ.P., in light of the restrictions against successive habeas litigation set forth in 28 U.S.C. § 2244(b), as amended by AEDPA. *Amici curiae*, as their states' chief law enforcement officers and defenders and enforcers of the judgments of their respective state courts, have a particular interest in the correct interpretation and application of AEDPA and, specifically, its restrictions against the filing of second or successive habeas petitions. That interest extends to ensuring that habeas petitioners, particularly capital habeas petitioners, are not allowed to circumvent those restrictions by resorting to a misuse of Rule 60(b).

STATEMENT OF THE CASE

Petitioner, Aurelio O. Gonzalez, a Florida prisoner, filed a petition for a writ of habeas corpus on June 23, 1997, challenging his 1982 convictions for robbery with a firearm, armed burglary, and armed kidnapping. J.A. 1 (R.1) He filed an amended petition on November 12, 1997, adding a claim challenging his sentence. J.A. 2 (R.10) Respondent asserted in response that the claims presented were barred by the one-year statute of limitations, 28 U.S.C. § 2244(d), and were procedurally defaulted. J.A. 2 (R.4, 12) On September 9, 1998, the district court dismissed the petition as time-barred. J.A. 3 (R.17)

Petitioner filed a notice of appeal, and though the district court had issued a certificate of appealability without elaboration, J.A. 4 (R.23), the appeal was dismissed without prejudice on October 28, 1999, and petitioner's application for a certificate of appealability was remanded to the district

court for a specific determination of which issues merited appeal under 28 U.S.C. § 2253. J.A.4 (R.25) Petitioner thereafter filed a new application for a certificate of appealability in the district court, which was denied on December 10, 1999. J.A. 4 (R.27) Petitioner filed a new notice of appeal, which the court of appeals treated as an application for a certificate of appealability and dismissed on April 6, 2000. J.A. 5 (R.32) Petitioner thereafter sought to file a petition to rehear the court of appeals' denial of a certificate of appealability in the original appeal, but that petition was returned unfiled on April 26, 2000.

On August 2, 2001, petitioner filed a motion under Fed.R.Civ.P. 60(b) in the district court, alleging, on the basis of intervening appellate decisions, that the district court had erred in dismissing his habeas petition as time-barred. J.A. 5 (R.33), 13 The district court denied the motion on March 5, 2002, J.A. 5 (R.34), 21, and denied a certificate of appealability on May 14, 2002. J.A. 6 (R.38) On August 15, 2002, a single judge of the court of appeals granted a certificate of appealability on the issue whether the district court had erred in dismissing the habeas petition as time-barred. J.A. 9 On January 10, 2003, however, a panel of the court of appeals quashed the certificate of appealability as improvidently granted and dismissed the appeal. J.A. 10

On April 1, 2003, the en banc court of appeals granted rehearing and consolidated petitioner's case with two others. J.A. 10 In an opinion issued on April 26, 2004, the en banc majority determined that petitioner's 60(b) motion was "attacking the merits of [the district court's] decision — the term merits referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations." J.A. 69 Applying this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), the court

held that petitioner's 60(b) motion was properly dismissed because it was "an attempt to relitigate a claim that has already been presented in a prior application and rejected, which means it must be dismissed under [28 U.S.C.] § 2244(b)(1)." J.A. 69 This Court granted certiorari to review that decision on January 14, 2005. *Gonzalez v. Crosby*, 125 S.Ct. 961 (2005).

SUMMARY OF THE ARGUMENT

AEDPA's restrictions against successive habeas litigation were enacted for the express purpose of addressing the problem of unnecessary and abusive delays in capital cases. But habeas petitioners, capital and non-capital alike, have sought to circumvent these restrictions by resorting to the use of Rule 60(b), Fed.R.Civ.P. The problem is particularly acute in capital cases, given the purpose and intent of AEDPA. The reality in such cases is that, after federal habeas proceedings have concluded, the interest of capital prisoners is in delay — an interest that led to the abuse of the writ that Congress sought to curb with AEDPA, and an interest that has led to the use of 60(b) in order to avoid what Congress has done. Recent experience in one state illustrates how 60(b) motions can be, and are being, used in capital cases not only to thwart AEDPA's restrictions against successive habeas litigation but also effectively to derail a state's efforts to protect its interest in finality and execute its lawful judgments.

In order to effectuate AEDPA's restrictions against successive habeas litigation, this Court should adhere to the rule it endorsed in *Calderon v. Thompson*, 523 U.S. 538 (1998), and hold that a Rule 60(b) motion that seeks to revisit the merits of a prior judgment denying habeas relief must be regarded as a second or successive petition. The "functional

approach" adopted by some lower courts is unfaithful to *Calderon* and is fundamentally flawed. It fails to account for an entire category of potential 60(b) motions and, thus, distinguishes between 60(b) motions that seek to revisit the merits of a prior final judgment depending upon the basis for that judgment, which is legally unsupportable. This flaw is significant. It effectively allows any capital or non-capital habeas petitioner a grand opportunity to engage in postjudgment, successive habeas litigation by merely assembling a new argument for why the prior judgment was incorrect.

ARGUMENT

This case calls upon the Court to decide whether, or to what extent, a habeas petitioner may utilize Rule 60(b), Fed.R.Civ.P., in light of the restrictions against successive habeas litigation set forth in 28 U.S.C. § 2244(b), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). How the Court resolves this issue has broad ramifications for all habeas cases, but its decision can be expected to have the most significant impact on capital habeas cases. Indeed, AEDPA was enacted precisely "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases . . . ." Joint Explanatory Statement of the Committee of Conference, H.Conf.Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944.[1] Although the case before the

[1] *See also* 141 Cong. Rec. S7803-01, 7877 (daily ed. June 7, 1995) (statement of Sen. Dole) (passage of bill that would become AEDPA "will go a long, long way to streamline the lengthy appeals process" in capital cases "[b]y imposing filing deadlines . . . and by limiting condemned killers . . . to one Federal habeas petition").

Court is not a capital case, it is the objective of this *amici curiae* brief to provide this Court with a perspective concerning how Rule 60(b) motions are being used, indeed abused, in capital cases and to show why it is essential that this Court adhere to a strict rule prohibiting a habeas petitioner's resort to Rule 60(b) to evade AEDPA's restrictions against successive habeas litigation.

I. CAPITAL HABEAS PETITIONERS USE RULE 60(B) TO CIRCUMVENT THE RESTRICTIONS AGAINST SUCCESSIVE HABEAS LITIGATION IN 28 U.S.C. § 2244(b).

A. After the Conclusion of Habeas Proceedings, The Sole Interest of Capital Habeas Petitioners Is In Litigation for Litigation's Sake and the Delay That It Engenders.

When habeas corpus proceedings — the final tier of the three-tier review system available to a state prisoner to challenge the validity of his conviction or sentence — have come to a close, "the State's interests in finality are all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). "At that point, having in all likelihood borne for years 'the significant costs of federal habeas review,' the State is entitled to the assurance of finality." *Id.*, 523 U.S. at 556 (quoting *McCleskey v. Zant*, 499 U.S. 467, 490-491 (1991)) (citation omitted). Once habeas review has been completed, therefore, a state should reasonably expect to be able to proceed to protect this interest and execute its lawful judgments. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty.'" *Id.*, 523 U.S. at 556 (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).

But, quite obviously, a capital prisoner who has exhausted the available avenues of review and who is facing imminent execution of his sentence does not share the state's interest in finality. At that point, his paramount interest is in delay; in engaging in litigation (or relitigation) for its own sake; in doing all that can be done to forestall the execution of the state court judgment. That is the reality of postjudgment capital habeas litigation. Indeed, petitioner's *amicus* openly admits that, when habeas petitioners have been cut off from one avenue of litigation, "[they] will simply style their cause of action differently." Brief of *Amicus Curiae* Abu-Ali Abdur'Rahman in Support of Petitioner (hereinafter "Abdur'Rahman Brief") at 23. And the case law bears him out. *See Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997) ("Instead of meeting the requirements of § 2244(b), the petitioner would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist."); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 640 (1998) ("[F]earing that the newly enacted [AEDPA] might foreclose review of his . . . claim, [petitioner] moved the court to reopen his earlier petition."); *Rodwell v. Pepe*, 324 F.3d 66, 69 (1st Cir.), *cert. denied*, 540 U.S. 873 (2003). ("Attempting to find a crack in the wall that Congress had erected to guard against the profligate filing of successive applications . . . [petitioner] filed a motion to reopen his original federal habeas case."); *In re Medina*, 109 F.3d 1556, 1561 (4th Cir. 1997) (referring to petitioner's resort to postjudgment filing as his "Rule 60(b) Stratagem"). Indeed, the strategy of filing a Rule 60(b) motion as an "alternative" to filing a prohibited second or successive habeas petition has been openly advocated as a

legitimate tactic to achieve the delays that AEDPA was designed to curtail.[2]

Petitioner's *amicus* contends that the use of Rule 60(b) motions in habeas cases is limited to a narrow class of cases. Based on his own research, he asserts that such motions are "rarely filed" and even more rarely granted. Abdur'Rahman Brief at 3, 4-5. But the assertion that "district courts seldom grant relief from a final judgment under Rule 60(b)" misses the point. It is not the extent to which relief is *granted* that poses a problem; it is the successive, postjudgment litigation and the delays that necessarily ensue from the *filing* of such motions that Congress intended to eliminate through AEDPA. *See Calderon*, 523 U.S. at 553 (by filing postjudgment motion, petitioners could evade § 2244(b)(1)'s "bar against *relitigation* of claims presented in a prior application" or § 2244(b)(2)'s "bar against *litigation* of claims not presented in a prior application") (emphasis added).

"[H]abeas petitioners should not be able to make an end-run around the requirements of AEDPA by simply styling their second or successive petition a 'motion to reopen.'" *Workman v. Bell*, 227 F.3d 331, 337 n.4 (6th Cir. 2000) (en

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[2] *See, e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Litigation*, 77 N.Y.U.L.Rev. 699, 792 (2002) (listing Rule 60(b) motions as an "alternative mechanism" and asserting that "Rule 60(b) offers a means for significantly reducing the systemic problems caused by AEDPA's successive petition rules"); *see also* Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 Am.J.Crim.L. 171, 221 (2003) ("In the quest for relief, prisoners have sought creative ways to avoid the strictures of the AEDPA.").

banc) (Opinion of Merritt, J.). But capital habeas petitioners have sought to do just that.[3] And although petitioner's *amicus* argues that the availability of Rule 60(b) to habeas petitioners is "critical" in order to provide relief in the truly meritorious case and to rectify an "unjust" result, Abdur'Rahman Brief at 6, 12, the argument fails to recognize that nearly *every* capital habeas petitioner believes that *his* motion is meritorious and that the result in *his* case was unjust.

Recent experience in one state starkly illustrates the "profound injury" to the State's interest in finality that can be caused by the availability of Rule 60(b) to capital habeas petitioners. That experience shows how Rule 60(b) motions can be, and are being, used by capital petitioners not only to thwart Congress' express restrictions on successive habeas litigation in AEDPA, but also effectively to derail a state's

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[3] *See, e.g., Smith v. Anderson*, __ F.3d __, 2005 WL 517525 (6th Cir. Mar. 6, 2005), *cert. denied*, __ S.Ct. __, 2005 WL 520024 (Mar. 7, 2005); *Alley v. Bell*, 392 F.3d 822 (6th Cir. 2004); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (Mar. 11, 2005); *Brown v. Head*, 349 F.3d 1291, 1293 (11th Cir. 2003); *Jones v. Roper*, 311 F.3d 923 (8th Cir. 2002); *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002); *Evans v. Smith*, 220 F.3d 306, 311 (4th Cir. 2000); *In re Medina*, 109 F.3d 1556, 1561 (11th Cir. 1997); *Baze v. Haeberlin*, No. 01-cv-31 (E.D. Ky.) (motion filed Feb. 23, 2005); *Bowling v. Haeberlin*, No. 99-cv-236 (E.D.Ky.) (motion filed Nov. 12, 2004); *Johnson v. Bell*, No. 2:97-cv-3052 (W.D.Tenn.) (motion filed Oct. 13, 2004); *Workman v. Bell*, No. 2:94-cv-2577 (W.D.Tenn.) (motion filed Aug. 27, 2004); *Zuern v. Tate*, No. 1:92-cv-771 (S.D.Ohio) (motion filed March 5, 2004); *Hutchison v. Bell*, No. 3:98-cv-664 (E.D.Tenn.) (motion filed Aug. 19, 2003); *Corey v. Bradshaw*, No. 5:96-cv-797 (N.D.Ohio) (motion filed July 22, 2003); *Clayton v. Ward*, No. 4:96-cv-173 (N.D.Okla.) (motion filed Dec. 18, 2000).

efforts to protect its interest in finality and execute its lawful judgments.

B. Recent Experience In Tennessee Shows How Capital Habeas Petitioners Can Use Rule 60(b) to Thwart AEDPA's Restrictions on Successive Habeas Litigation and Debase the State's Interest in Finality.

Between April 2002 and November 2004 in the State of Tennessee, five capital prisoners were scheduled for execution after the conclusion of their federal habeas corpus proceedings: Abu-Ali Abdur'Rahman, Philip Workman, Olen Eddie Hutchison, Sedley Alley, and Donnie Johnson. In all, seven execution dates were set in their cases during this period.[4] None of these executions was carried out, and each and every one of these five prisoners, before each and every one of the seven execution dates, filed a motion for relief from judgment under Rule 60(b).[5]

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[4] Two of these five prisoners — Abdur'Rahman and Workman — had their initial dates reset. Only one other capital prisoner was scheduled for execution during this period: Gregory Thompson. Thompson's August 19, 2004, execution was stayed by the Sixth Circuit on June 23, 2004, upon that court's *sua sponte* reconsideration of its decision affirming the denial of habeas relief and its subsequent reversal and remand of the district court judgment. That decision is now on review before this Court. *Bell v. Thompson, cert. granted* (No. 04-514) (Jan. 7, 2005).

[5] Eight 60(b) motions were filed in all: Abdur'Rahman filed two, Workman filed two, Alley filed two, and Johnson and Hutchison each filed one.

All of these motions were filed either after the Sixth Circuit's mandate had issued from the judgment denying habeas relief or after this Court had denied certiorari review of that judgment,[6] and all were filed either in anticipation of the Tennessee Supreme Court's setting an execution date, or in the wake thereof.[7] And all but one of these seven execution dates was nullified by a federal court's stay of execution issued as a direct result of the prisoner's filing of a Rule 60(b) motion.

Every one of these motions sought to revisit the merits of the district court's judgment, alleging variously that the district court's denial of relief had been "erroneous," "improper," "incorrect," or "questionable." And every motion alleged that the prisoner had been subjected to some manner of "injustice." In addition, two of the five motions insisted that the prisoner had been wrongly convicted. Finally, though such instances are supposed to be "rare," *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1506 n.3 (1st Cir. 1989), four of the five motions alleged that the prisoner had been the victim of a fraud upon the court.[8]

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[6] *See* Fed.R.App.P. 41(d)(2)(D) (appellate mandate must issue immediately upon filing of a copy of the order denying certiorari).

[7] No 60(b) motion was filed any more than eight months prior to the scheduled execution date, and four were filed within 34 days of the execution date.

[8] *See United States v. Beggerly*, 524 U.S. 38, 46 (1998) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)) (only a "grave miscarriage of justice" will amount to fraud on the court). The Sixth Circuit had recognized "fraud on the court" as an exception to the rule against successive petitions. *See Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). Its

1. *Abu-Ali Abdur'Rahman:* Petitioner's *amicus* Abu-Ali Abdur'Rahman kicked off the Rule 60(b) parade on November 2, 2001 — twenty-four days after this Court denied certiorari review of the Sixth Circuit's denial of habeas relief, *Abdur'Rahman v. Bell,* 534 U.S. 970 (2001) — by filing the first of two Rule 60(b) motions.[9] His motion sought to reopen fourteen claims, ten of which had been denied by the district court in 1998 as procedurally defaulted, and was predicated on an intervening state court rule.[10] It alleged that the district court had erred when it ruled that these claims were procedurally defaulted and that "it would be a profound and irreparable miscarriage of justice" to deny him relief. *Abdur'Rahman v. Bell*, No. 96-cv-380 (M.D.Tenn.) (Abdur'Rahman's Nov. 2, 2001, motion for relief from judgment, pp. 8, 11)[11] After the district court transferred the 60(b) motion to the Sixth Circuit as a successive habeas petition, the Tennessee Supreme Court set an execution date of April 10, 2002. But after the Sixth Circuit approved the transfer and rejected the successive petition, this Court granted a stay of execution on April 8, 2002, *Abdur'Rahman v. Bell*, 535 U.S. 981 (2002), and granted certiorari on April

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invocation in nearly every one of these Tennessee cases demonstrates yet another reality — when capital habeas petitioners are given an inch, they inevitably seek to take a yard.

[9] The Sixth Circuit's mandate issued on February 11, 2002.

[10] Tenn.Sup.Ct.R. 39.

[11] In subsequent proceedings before the en banc court of appeals, Abdur'Rahman asserted that his case "presents the rare Rule 60(b) motion that is not the practical equivalent of a successive application." *In re Abdur'Rahman*, Nos. 02-6547/6548 (6th Cir.) (Pet.Supp.Brf., p. 19).

22, 2002. *Abdur'Rahman v. Bell*, 535 U.S. 1016 (2002). The writ was dismissed, however, on December 10, 2002, as improvidently granted. *Abdur'Rahman v. Bell*, 537 U.S. 88 (2002).

While the State responded to this dismissal by seeking a new execution date, Abdur'Rahman responded to it by filing a second, identical Rule 60(b) motion on December 12, 2002, two days after this Court's dismissal of the writ. After the district court again transferred the motion to the court of appeals as a successive petition, the Tennessee Supreme Court, on March 6, 2003, reset the execution date for June 18, 2003. A panel of the Sixth Circuit again approved the transfer, but the en banc court granted rehearing and stayed the execution on June 6, 2003. *Abdur'Rahman v. Bell*, 332 F.3d 960 (6th Cir. 2003).[12]

2. *Philip Workman:* Meanwhile, on June 2, 2003, the Tennessee Supreme Court had reset a date of September 24, 2003, for execution of the sentence of Philip Workman, whose federal habeas proceedings had long since concluded.[13]

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[12] The Sixth Circuit decided the case on December 13, 2004, holding that Abdur'Rahman's 60(b) motion was not a successive petition, and the stay remains in place. *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (March 11, 2005).

[13] *See Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998). The Sixth Circuit's mandate issued in Workman's habeas case on October 12, 1999. An execution date had been scheduled and stayed in 2000, when Workman moved to reopen his appeal in the Sixth Circuit. *See Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000). An execution date was also scheduled and stayed in 2001, when Workman petitioned in state court for a writ of error coram nobis.

Twenty-one days before the execution, on September 3, 2003, Workman filed a motion for relief from judgment under Rule 60(b). This motion sought to reopen several claims that the district court had denied in 1996 on their substantive merits and was predicated on allegations of "fraud and misconduct,"[14] as well as intervening appellate decisions of this Court and the Sixth Circuit.[15] It alleged that the district court had erred when it denied relief on these claims, that Workman had been "unjustly convicted," that the court needed to "prevent a miscarriage of justice," and that, because Workman's life was at stake, the court should "remedy the inequity that has occurred." *Workman v. Bell*, No. 94-2577 (W.D.Tenn.) (Workman's Sept. 3, 2003, motion for relief from judgment, pp. 4, 14, 18). Workman also moved for a stay of execution, but on September 15, 2003, the Governor of Tennessee issued a temporary reprieve for reasons unrelated to the 60(b) motion.

The reprieve was lifted seven months later, however, and on May 4, 2004, the Tennessee Supreme Court reset the date of execution to September 22, 2004. Twenty-six days before the execution, on August 27, 2004, Workman filed a second, nearly identical 60(b) motion, which he styled as a "First

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See Workman v. State, 41 S.W.3d 100 (Tenn. 2001).

[14] The fraud allegations were based largely on evidence Workman presented at his state coram nobis hearing — evidence that the state courts concluded would have made no difference had it been presented at his trial. *See State v. Workman*, 111 S.W.3d 10 (Tenn.Crim.App. 2002).

[15] *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2902 (2004).

Amended" motion. This motion sought to reopen all the claims presented in the first motion, as well as an additional claim that had been denied by the district court in 1996 as procedurally defaulted.[16] *Workman v. Bell*, No. 94-2577 (W.D.Tenn.) (Workman's August 27, 2004, "First Amended" motion for relief from judgment). On September 1, 2004, the district court stayed the execution on the basis of the 60(b) motion, pointing to the pendency of Abdur'Rahman's case in the Sixth Circuit.[17]

3. *Olen Eddie Hutchison*: At about the same time that Workman's 2003 execution date was being reset, the habeas proceedings of Olen Eddie Hutchison were coming to a close. On August 19, 2003, less than two months after this Court denied certiorari review of the Sixth Circuit's denial of habeas relief, *Hutchison v. Bell*, 539 U.S. 944 (2003), Hutchison filed a motion for relief from judgment under Rule 60(b).[18] This motion sought to reopen three claims — two that the district court had denied in 2000 as procedurally defaulted, and one that it had denied on its substantive merits. The motion was predicated on allegations of "fraud upon the

[16] This additional ground was predicated on another intervening decision of the Sixth Circuit, *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004), *rev'd, Bell v. Cone*, 125 S.Ct. 847 (2005).

[17] The State moved to vacate in the Sixth Circuit, but a panel of that court denied the motion without prejudice to its renewal. After Abdur'Rahman's case was decided, the State renewed its motion to vacate, and it remains pending. *See Workman v. Bell*, Nos. 04-6037/6038 (6th Cir.).

[18] The Sixth Circuit's mandate issued on September 12, 2003.

court,"[19] an intervening state court rule,[20] and intervening appellate decisions of the Sixth Circuit.[21] It alleged that the district court had "improperly imposed a procedural bar," that Hutchison had not received "equal justice," and that "[p]rinciples of justice and fairness require that this [c]ourt take another look at the case . . . ." *Hutchison v. Bell*, No. 3:98-664 (E.D.Tenn.) (Hutchison's August 19, 2003, motion for relief from judgment, pp. 2, 7, 18)

On September 30, 2003, the Tennessee Supreme Court set a date of March 11, 2004, for execution of Hutchison's sentence. On January 22, 2004, the district court stayed Hutchison's execution on the basis of his 60(b) motion. Although the court had construed the motion as a successive habeas petition, the court pointed to the pendency of Abdur'Rahman's case in the Sixth Circuit as grounds for the stay.[22]

4. *Sedley Alley*: Shortly after habeas proceedings concluded in Hutchison's case, they also concluded in Sedley Alley's case. On October 6, 2003, this Court denied

[19] The fraud allegations were based on a legal argument made by the State in its brief in opposition to the petition for writ of certiorari Hutchison filed in 2002.

[20] Tenn.Sup.Ct.R. 39.

[21] *Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 541 U.S. 956 (2004), and *Davis*, 318 F.3d 682.

[22] The State moved to vacate the stay in the Sixth Circuit on February 17, 2004, but the execution date passed without a decision on the motion. The motion was subsequently denied on May 24, 2004.

certiorari review of the Sixth Circuit decision affirming the denial of habeas relief, *Alley v. Bell*, 540 U.S. 839 (2003), and Alley filed a motion for relief from judgment under Rule 60(b) four days later, on October 10, 2003.[23] The motion sought to reopen two claims, both of which had been denied by the district court in 1999 on their substantive merits. *Alley v. Bell*, No. 97-3159 (W.D.Tenn.) (Alley's October 10, 2003, motion for relief from judgment).

On January 16, 2004, the Tennessee Supreme Court set a date of June 3, 2004, for execution of Alley's sentence. Twenty-seven days before the execution, on May 12, 2004, Alley filed a second 60(b) motion, which he styled a "First Amended" motion.[24] This motion sought to reopen the two claims addressed by the first motion, as well as a third claim that had also been denied by the district court in 1999 on its substantive merits. The motion was predicated on allegations of "fraud upon the court"[25] and intervening appellate decisions of the Sixth Circuit and the Tennessee Supreme Court.[26] It alleged that the denial of relief was "clearly

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[23] The Sixth Circuit's mandate issued on October 27, 2003.

[24] The district court entered an order on April 19, 2004, striking Alley's initial motion, without prejudice, and instructing him that he could refile after Abdur'Rahman's case was decided.

[25] The fraud allegations were based on supposedly "new" and allegedly withheld evidence. But the Sixth Circuit subsequently determined that Alley's "fraud on the court" claim "was essentially indistinguishable from a standard *Brady* constitutional claim." *Alley v. Bell*, 392 F.3d 822, 831 (6th Cir. 2004).

[26] *Cone*, 359 F.3d 785, and *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003), *cert. denied*, 540 U.S. 1221 (2004).

erroneous," that Alley "did not commit the offense for which he was convicted," and that his was "one of the rare cases which 'cries out for the exercise of that equitable power to do justice.'" *Alley v. Bell*, No. 97-3159 (W.D.Tenn.) (Alley's May 12, 2004, "First Amended" motion for relief from judgment, pp. 1, 4, 9). On May 19, 2004, the district court stayed Alley's execution on the basis of his 60(b) motion, pointing to the pendency of Abdur'Rahman's case in the Sixth Circuit.

The State moved to vacate the stay in the Sixth Circuit, but a panel of that court declined to grant the motion and set the matter for expedited briefing and argument. The case was not decided, however, until the day after Abdur'Rahman's case was decided. The court then vacated the stay, holding that Alley's motion was a successive petition. *Alley v. Bell*, 392 F.3d 822, 829 (6th Cir. 2004).[27] Although the State promptly moved to set a new date for execution of Alley's sentence, the Tennessee Supreme Court, no doubt gun-shy at this point, denied the motion, noting "the potential for further rulings by the federal courts that could render ineffectual any date set."[28]

5. *Donnie Johnson:* Approximately two months before Alley's June 2004 scheduled execution date, habeas proceedings concluded for Donnie Johnson. This Court denied certiorari review of the Sixth Circuit's denial of habeas relief on April 26, 2004, *Johnson v. Bell*, 541 U.S. 1010

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[27] Though a petition for en banc rehearing is pending, the district court ordered Alley on March 16, 2005, to withdraw his 60(b) motion by April 20, 2005.

[28] *See State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn.) (Jan. 6, 2005, order denying motion to reset date of execution).

(2004), and the Sixth Circuit mandate issued on May 5, 2004. On August 10, 2004, the Tennessee Supreme Court set a date of November 16, 2004, for execution of Johnson's sentence. A month before the execution, on October 13, 2004, Johnson filed a motion for relief from judgment under Rule 60(b). The motion sought to reopen three claims that had been denied by the district court in 2001 as procedurally defaulted, and it was predicated on allegations of "fraud, misconduct, or misrepresentation"[29] and intervening appellate decisions of this Court and the Sixth Circuit.[30] It alleged that the district court had issued an "unjust judgment," that the denial of relief was "clearly erroneous," that "there could be no greater injustice," and that, because Johnson's life was at stake, the court should "remedy the inequity that has occurred . . . ." *Johnson v. Bell*, No. 2:97-3052 (W.D.Tenn.) (Johnson's October 13, 2004, motion for relief from judgment, pp. 4, 7, 12, 18). The district court stayed Johnson's execution on the basis of his 60(b) motion, again pointing to the pendency in the Sixth Circuit of Abdur'Rahman's case.[31]

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[29] The fraud allegations were based on an affidavit Johnson presented that allegedly rebutted an affidavit presented to the district court in the course of the habeas proceedings.

[30] *Banks v. Dretke*, 540 U.S. 668 (2004); *Cone*, 359 F.3d 785; and *Davis*, 318 F.3d 682.

[31] The State moved to vacate in the Sixth Circuit, but that motion was denied without prejudice on November 15, 2004. *See Johnson v. Bell*, No. 04-6361 (6th Cir.). The State has since moved in the district court to vacate the stay, and that motion remains pending.

II. MOTIONS FILED UNDER RULE 60(B) THAT SEEK TO REVISIT THE MERITS OF THE UNDERLYING FEDERAL HABEAS JUDGMENT SHOULD BE REGARDED AS SECOND OR SUCCESSIVE PETITIONS.

A. This Court Endorsed the Proper Rule In *Calderon v. Thompson*.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court endorsed the proposition that a habeas petitioner's postjudgment motion that the court revisit the merits of its earlier decision denying habeas relief can be regarded as a second or successive application for purposes of 28 U.S.C. § 2244(b). 523 U.S. at 553, 557. Indeed, this proposition appears to have enjoyed the Court's unanimous support. *See id.*, 523 U.S. at 569 & n.1 (Souter, J., dissenting). "Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.*, 523 U.S. at 553. The Court observed, however, that such a rule prohibiting relitigation of the merits of the underlying habeas judgment would not extend to postjudgment motions alerting the court to clerical errors, like those described in Fed.R.Civ.P. 60(a); nor would it extend to postjudgment motions alleging a fraud upon the court and thus "calling into question the very legitimacy of the judgment." *Id.*, 523 U.S. at 557 (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)).

But as discussed above, habeas petitioners have routinely utilized Rule 60(b) to do precisely what § 2244(b) and *Calderon* say they cannot: revisit the merits of the underlying federal habeas judgment. And although *Calderon* was not a

case involving the strict application of AEDPA,[32] this Court should adhere to the rule it endorsed there and hold that 60(b) motions that seek to revisit the merits of the underlying federal habeas judgment not only can, but must, be regarded as second or successive petitions. Anything less will simply fail to effectuate AEDPA's bar against successive habeas litigation.[33]

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[32] AEDPA did not strictly apply in *Calderon* merely because the court of appeals had not acted on the basis of any matter presented by the petitioner's second petition, *i.e.*, his motion to recall the mandate, but instead had acted *sua sponte* on the basis of the first petition. *See id,* 523 U.S. at 554.

[33] Petitioner and his *amicus* argue that *Calderon* is inapposite because it involved a postjudgment motion to recall the mandate in the court of appeals, and not a postjudgment motion for relief from judgment in the district court. Pet.Br. at 23-24; Brief of the Office of the Federal Public Defender for the Middle District of Tennessee as *Amicus Curiae* in Support of Petitioner at 10 n.6. This attempt to distinguish *Calderon* is unpersuasive. A motion to recall the mandate asks the court of appeals to exercise its inherent authority to reopen and revisit its own judgment, *see Calderon*, 523 U.S. at 550; as petitioner and his *amicus* insist, so too does a motion for relief from judgment. *See Burris*, 130 F.2d at 783 (motion to recall mandate is court of appeals' "equivalent" of motion for relief from judgment in district court). Moreover, what matters is not how a motion for relief from judgment compares to a motion to recall the mandate, but how each compares to a second or successive petition. Viewed in this light, if *a motion to reopen and revisit the merits of a habeas judgment* in the court of appeals can be regarded as a second habeas petition, how can *a motion to reopen and revisit the merits of a habeas judgment* in the district court not be?

B. The "Functional Approach" Touted By Petitioner and His *Amici* Is Fundamentally Flawed.

Notwithstanding this Court's decision in *Calderon*, some courts of appeals have adopted, and petitioner and his *amici* highly tout, a "functional approach" to determining whether a motion ostensibly filed under Rule 60(b) should be treated as a second or successive petition under § 2244(b). But this approach is fundamentally flawed — it fails to account for an entire category of Rule 60(b) motions. And the flaw in this approach leads to its treating 60(b) motions differently depending upon whether the underlying judgment was based on substantive or procedural grounds. Drawing a distinction on this basis is legally unsupportable and has significant ramifications inconsistent with the intent of AEDPA.

1. Unlike the rule endorsed in *Calderon*, which asks whether the postjudgment motion seeks to reopen on the basis of the merits of the underlying federal court judgment, this so-called "functional approach" asks a different question: whether the postjudgment motion directly challenges the constitutionality of the underlying state court conviction or sentence. *See In re Abdur'Rahman*, 392 F.3d 74, 181 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (March 11, 2005) (citing *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir.), *cert. denied*, 540 U.S. 873 (2003)); *United States v. Winestock*, 340 F.3d 200, 207 (4th Cir.), *cert. denied*, 540 U.S. 995 (2003). "[I]f — and only if —" it does, then the motion can be treated as a successive petition. *Rodwell*, 324 F.3d at 67. This part of the test embraces motions seeking to revisit the merits of a habeas judgment denying relief on substantive grounds. *See, e.g., Smith v. Anderson*, __ F.3d __, 2005 WL 517525, *2, 5 (6th Cir. Mar. 6, 2005), *cert. denied*, __ S.Ct. __, 2005 WL 520024 (Mar. 7, 2005); *Alley*

v. Bell, 392 F.3d 822, 826, 829 (6th Cir. 2004), *Winestock*, 340 F.3d at 202, 208.

Conversely, according to the functional approach, if the factual predicate for a 60(b) motion alleges a defect or procedural irregularity in the habeas process, and thus challenges the "integrity" of the habeas judgment, then it should be treated as a legitimate 60(b) motion. *Abdur'Rahman*, 392 F.3d at 181; *Rodwell*, 324 F.3d at 70; *see Winestock*, 340 F.3d at 207. This second part of the test embraces motions that do not seek to revisit the merits of the judgment denying a habeas claim, but instead challenge the *process* that led to that judgment. *See Rodwell*, 324 F.3d at 70 (citing "[m]istake and fraud" as examples); *Winestock*, 340 F.3d at 207 (citing "fraud on the court" as an example); *see also Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002) (suggesting that motion alleging that dismissal had been procured by state's "making fraudulent representations" would not be successive petition); *Thompson v. Calderon*, 151 F.3d 918, 921 n.3 (9th Cir. 1998) (en banc) (stating that state's misconduct in preventing a petitioner from testing potentially exculpatory evidence "might" make a 60(b) motion appropriate).[34]

The logical flaw in this approach lies in the fact that its second part is not a true converse of the first; it fails to account for a third category of 60(b) motions — those motions whose factual predicates neither directly challenge the

[34] It is this category of postjudgment motions that this Court seemed to have in mind when in *Calderon* it identified, in passing, examples of exceptions to the rule that it endorsed there, *i.e.*, instances of clerical error and fraud upon the court. 523 U.S. at 557.

underlying state court judgment nor allege a defect or irregularity in the habeas process. An obvious example of such a motion is one seeking to revisit the merits of a habeas judgment denying relief on *procedural* grounds, *i.e.*, one, like petitioner's, seeking to revisit the merits of a dismissal on statute of limitations grounds;[35] or one, like that of petitioner's *amicus*, seeking to revisit the merits of a denial of relief on procedural default grounds. *See Abdur'Rahman*, 392 F.3d at 182. 60(b) motions like these do the work of successive petitions; in both instances, the habeas petitioner is "continuing his collateral attack on his conviction or sentence." *Winestock*, 340 F.3d at 207. But the functional approach would not treat these motions as successive petitions, simply because it fails to address them at all. *See Abdur'Rahman*, 392 F.3d at 182 (motion seeking to revisit merits of habeas judgment, "specifically, the basis for the district judge's procedural default ruling," did not present a direct challenge to underlying state court conviction and, thus, should not be treated as a successive petition); *see also Harper v. Vaughn*, 272 F.Supp.2d 527, 532 (E.D.Pa. 2003) (motion alleging error in procedural default judgment did not

[35] Petitioner's motion solely contended "that the judgment was wrong," based on intervening appellate decisions. J.A. 69 It cannot be said that his motion directly challenges the underlying state court conviction or sentence. But neither can it be said that it attacks the *integrity* of the judgment, or the process that led to it. It attacks the *correctness* of that judgment, *see* J.A. 69, in the very same way that a motion contending that a substantive merits judgment was wrong attacks the correctness and not the integrity of that judgment. But the functional approach would treat these two motions differently.

raise arguments concerning constitutionality of state court conviction and, thus, was not successive petition).[36]

2. The functional approach thus operates so as to treat 60(b) motions differently depending upon whether the prior judgment denied claims on substantive grounds or on procedural grounds. *See Abdur'Rahman*, 392 F.3d at 181 (inviting comparison of *Hamilton v. Newland*, 374 F.3d 822 (9th Cir. 2004), *cert. denied*, __ S.Ct. __, 2005 WL 517049 (Mar. 7, 2005), in which 60(b) motion was not treated as successive petition where it sought reconsideration of prior dismissal under statute of limitations, *id.*, 374 F.3d at 824, with *Rodwell*, 324 F.3d 66, in which 60(b) motion was regarded as successive petition where it asserted, at most, that district court "would have ruled differently" on Sixth Amendment claim, *id.*, 324 F.3d at 72). But there is no support in § 2244(b), or in this Court's prior decisions, for distinguishing postjudgment habeas motions on this basis.

28 U.S.C. § 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under

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[36] It is no answer to say that a motion seeking to revisit the merits of a prior procedural judgment is fairly characterized as a 60(b) motion, and not a successive petition, because the challenge it presents to the underlying state court conviction is indirect. *See Abdur'Rahman*, 392 F.3d at 180-181. Even a second habeas petition presenting claims previously adjudicated on procedural grounds would present only an indirect challenge to the underlying state court conviction. Such claims would not, and could not, be considered until and unless the petitioner also presents some basis upon which to overcome the prior procedural judgment, *i.e.*, until he shows why the court was wrong to have denied them the first time — just as is the case when the claims are presented for reopening in a 60(b) motion.

section 2254 that was presented in a prior application shall be dismissed." Period. The statute includes no mention whatever of the basis upon which the claims presented in the prior application need to have been adjudicated. It certainly does not provide that the claims presented in the prior application need to have been adjudicated on their merits, much less their substantive merits. AEDPA, in fact, pointedly removed any such reference from § 2244(b),[37] evincing Congress' clear intent that no distinction be drawn based on the grounds upon which the claims were previously adjudicated.[38]

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[37] The predecessor version of § 2244(b) provided:

> When after an evidentiary hearing *on the merits* of a material factual issue, or after a hearing *on the merits* of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1996) (emphasis added).

[38] Drawing a distinction between claims adjudicated on substantive grounds and those adjudicated on procedural grounds is also inconsistent with another aspect of the habeas scheme

And this Court's prior decisions interpreting § 2244(b), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), instruct that claims presented in the prior application need only have been *finally* adjudicated, not that they have been adjudicated on any particular grounds. These two cases involved claims presented in a prior application that had been dismissed as premature and dismissed for failure to exhaust, respectively. The Court held in both cases that a subsequent presentation of the claim did not violate the statute's prohibition against successive petitions because "in both situations, the habeas petitioner does not receive an adjudication of his claim." *Martinez-Villareal,* 523 U.S. at 645. But the same cannot be said of the dismissal or denial of habeas claims on procedural grounds such as the statute of limitations or procedural default, for in those instances, the habeas petitioner *does* receive an adjudication of his claim. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (rules of finality treat dismissal on statute of limitations grounds as a "judgment on the merits"); *see also Murray v. Greiner,* 394 F.3d 78, 81 (2d Cir. 2005) (dismissal on basis of statute of limitations, like dismissal on basis of procedural default, was "adjudication on the merits"). The notion, then, that a habeas petitioner is entitled to one substantive merits adjudication — the stated and unstated lynchpin of the arguments advanced by and on behalf of petitioner — is simply unsustainable.

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established under AEDPA. Under 28 U.S.C. § 2253, an appeal from the denial of habeas relief cannot proceed without a certificate of appealability. And as this Court held in *Slack v. McDaniel*, 529 U.S. 473 (2000), claims denied on procedural grounds are subjected to a very similar standard for determining whether an appeal is justified as are those denied on their substantive merits. *See id.*, 529 U.S. at 484.

3. The logical flaw in the functional approach, and its consequent, and unsupportable, substantive/procedural distinction between final habeas judgments, is no small matter. A 1995 Justice Department report found that 63% of all habeas corpus claims were dismissed and that 12% of these were procedurally defaulted. U.S. Dep't of Justice, Office of Justice Programs, *Federal Habeas Corpus Review, Challenging State Court Criminal Convictions* 17 (1995).[39] In capital cases, claims are typically denied or dismissed on procedural grounds at a far higher rate. In the five Tennessee capital cases featured above, for example, 44% of all the claims presented in the petitions, on average, were dismissed or denied on procedural grounds.[40]

A capital habeas petitioner, then, intent on engaging in successive relitigation after his habeas proceedings have concluded so as to delay execution of the state court judgment, would have a grand reservoir of claims available for resurrection by filing a 60(b) motion. And adoption of the "functional approach" would allow him to do it; indeed, the "case by case" inquiry demanded by the functional approach

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[39] This 1995 report was issued, of course, before the creation of a federal habeas statute of limitations, which added yet another procedural ground upon which claims could be dismissed or denied. While wholesale dismissal of capital habeas petitions on timeliness grounds is admittedly rare, individual claims added after the limitations period has run nevertheless can be dismissed on such grounds. *But see Mayle v. Felix,* 125 S.Ct. 824 (2005) (granting certiorari to address question whether habeas petition may be amended by adding a new claim after limitations period has run).

[40] Abdur'Rahman: 51 of 89 claims (57%); Hutchison: 91 of 188 claims (48%); Workman: 9 of 48 claims (19%); Alley: 29 of 72 claims (40%); Johnson: 61 of 108 claims (56%).

effectively *invites* him to do it. *Rodwell*, 324 F.3d at 70. He would need only to assemble a new argument, based, for example, on intervening court decisions or newly gathered evidence, for why the district court's procedural judgment was erroneous, *i.e.*, for why the statute of limitations was improperly applied, or for why he can now show that he did exhaust his claims, or for why he can now show cause for his default, or for why he can now show a fundamental miscarriage of justice, *etc*. *See* J.A. 69 (observing how habeas petitioner could use Rule 60(b) to reopen on basis of a new decision "even if that decision came ten, twenty, or thirty years after the judgment had been rendered").

The finality of a federal court's habeas judgment is not so frail, at least not under AEDPA. Indeed, this Court has long encouraged, if not insisted, that federal habeas courts dispose of presented claims on any available procedural grounds — without reaching the substantive merits of those claims. *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997); *Smith v. Murray*, 477 U.S. 527, 533 (1986). It would be quite strange for such procedural judgments to now enjoy a lesser degree of finality than those based on the court's having reached the substantive merits of a claim.

Petitioner and his *amicus* stress the importance of the balance struck by Rule 60(b) between the value of finality and the need for justice, Pet.Br. at 40; Abdur'Rahman Brief at 4, 20, but in the habeas context, particularly the capital habeas context, Congress has found it necessary to strike a different balance between these interests — one that places greater emphasis on the finality of federal habeas judgments and, at the same time, gives regard to the "paramounce" of the states' interest in finality. While petitioner and his *amici* may perceive unfairness in Congress' determination, the debate has

nonetheless been closed. And it is wrong for them to ask this Court to reopen it.

CONCLUSION

For the reasons advanced herein and in respondent's brief, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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